PUBLIC PROSECUTOR

v.

YAP HAI LING

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[SELANGOR CRIMINAL TRIAL NO. SCT CR 58-13-86]
22 AUGUST 1989

CRIMINAL PROCEDURE: *Charge of possession - Presumptions under s. 37(g) of the Dangerous Drugs Act - Occupation of house - Proof of management and control - Occupation - Presumptions under s. 37(g).*

EVIDENCE: *Hearsay evidence - Whether accused sole cultivator of land - Newspapers used to wrap drugs - Whether easily available - Difficulty in distinguishing plastic bags - Dacing - Forced admission of guilt - Whether statement inadmissible by virtue of s. 113 of Criminal Procedure Code - Section 37(A) of the Dangerous Drugs Act - Representations made to police officer below the rank of inspector - Delusionary account of events - Corroboration.*

On 29 June 1985, a police party raided an unnumbered house in Banting where in one of the rooms, the police found the accused's wife and his three children. In the house itself, the police found nothing incriminating, they therefore proceeded outside. At the back of the house, 2 plastic bags were recovered containing the drug, morphine. This was the first discovery. In the same area, they found other utensils such as a plastic pail, cooking pot, an enamel basin and a gas burner.

Later, the police made a search of the vicinity of the compound of the house (some 50 feet away from the house) where they found in some milk powder tins, four plastic bags containing varying weights of heroin, the 'second discovery'. The packets were wrapped in newspapers.

Following these discoveries, the investigating officer (PW1) arrived at the scene and took over the investigations.

PW1 later found a small "dacing" and copies of old newspapers in the kitchen of the house, and in a covered utility area outside of the house, he recovered 2 bundles of 6" x 9" plastic bags. It was to be noted however that no trace of heroin or morphine was detected at the exterior utility area or the nearby shed.

The accused was subsequently charged for possession of drugs.

Held:

[1] The police did not produce any evidence to establish that the accused's family were the sole occupants of the house.

[2] It was unreasonably and certainly unjudicious to impute that the newspaper wrappings and plastic packing of the drugs came from the accused's kitchen as both material were easily available being common items of any household.

Further, the plastic bags were found outside the kitchen and the newspapers were only recovered some 7 hours later in an unguarded part of the kitchen.

[3] The "dacing" can be used for a variety of reasons and no traces of drugs were found on it.

[4] The evidence of the accused's conduct, namely his alleged fainting during interrogation by PW3, is tantamount to as a forced admission of his guilt and therefore inadmissible by virtue of s. 113 of the Criminal Procedure Code and s. 37(A) of the Dangerous Drugs Act.

[5] Eventhough the above was admissible, it would have been rendered inadmissible as it is a representation to a police officer below the rank of Inspector.

[6] The Court was unable to accept the allegation by the police that the accused knew where the drugs were, and further PW3's story was not corroborated by PW7.

[7] The Court was not prepared to infer that the accused had exclusive management and control of the exterior of his house where the drugs were found, therefore the presumptions under s. 37(g) cannot be invoked.

[8] The prosecution had failed to make out a *prima facie* case against the accused.

[Accused acquitted and discharged.]

Cases referred to:
Teper v. R [1952] AC 480
Lim Say Hun v. PP [1950] MLJ 116
PP v. Lai Ah Bee [1974] 2 MLJ 74
Low Geok Yeok v. PP [1982] 2 MLJ 347
PP v. Ahmad bin Puteh & Ors. [1987] CLJ (Rep) 853

Legislation referred to:
Criminal Procedure Code, s. 113
Dangerous Drug Act 1952, ss. 37A, 37(b), (g)

For the defendant - Mohamed Ali Aziz; M/s. Mohamed Ali Aziz & Co.
For the plaintiff - Timbalan Pendakwa Raya; Jabatan Peguam Negara

JUDGMENT

Wan Yahya J:

At 15 minutes past midnight on 29 June 1985 a police party led by Inspector Giam raided an unnumbered house on Lot 619, 11/2 m.s. Jalan Telok Bunut, Banting. In one of the rooms they found the accused's wife and his three children and in another PW3 found some small plastic bags and a weighing machine. According to PW3 when he questioned the accused on the purpose of keeping such bags, the accused fainted. In the house itself, the party found nothing incriminating against the accused and so they proceeded outside through the back door. In a red plastic pail under the covered portion, outside the back of the house, PW3 noticed some cereals on which he recovered two plastic packets containing 5.61 gm of morphine (P13D) and 30.86 gms of heroin (P13F) - hereinafter referred to as "the first discovery". In the same area there were also other utensils such as plastic pail (P12B), cooking pot, enamel basin and a gas burner (P14 BC DE, P15B, P16B, P17ABC and P18B) which the police took possession of.

The police party then made a search of the vicinity of the back compound of the premises. At this stage PW3 who was standing with PW4 and the accused at the right rear corner of the house said she noticed the accused who was facing toward the road and in the opposite direction of the search party craning his neck towards his left on several occasions to look at a spot within the palm trees. According to PW3 he immediately went there with PW7 and the accused, and with the aid of his torch light, he saw a white open polystyrene box in

which there were two Dutch Baby milk powder tins. Inspector Giam opened these tins inside which he found four plastic packets containing 63.40 gms (P20E), 60.74 gms (P20H), 67.39 gms. (P21E) and 62.95 gms (P21H) of heroine - hereinafter referred to as "the second discovery" - the packets were wrapped in newspaper (P20B) and (P21B). At the same place, PW2 found two jerry cans one containing ethyl alcohol and the other acetic anhydride. Some 30 ft away three bottles containing hydrocloric acid were also recovered.

Following these discoveries the IO (PW1) was informed at about 1.15a.m. He arrived at 2.30 a.m. to take over the investigation. After photographs of the various exhibits were taken, PW1 took possession of the heroin and morphine but left all the other exhibits at the back of the house to be guarded by two constables. He returned at 9.00 a.m. for a further search. In the kitchen cabinet, he found a small 'dacing', P27B and 105 copies of old newspapers (P34B) on a concrete table. He also took possession of a LLN Consumer Contract (P3), a TV licence P4, water bill (P5) and two electric bills (P6AB) from within the house. In the covered utility area outside the rear of house, he recovered two bundles of 6" x 9" plastic bags. On 2 July 1985 PW1 returned once more to the scene accompanied by the chemist. However, no trace of heroin or morphine could be detected at the exterior utility area or the nearby shed.

The accused was subsequently charged for possession of drugs recovered at both places totalling to 285.34 gms heroin and 5.65 gms of morphine.

In respect of the second discovery (P20E & H and P21 E & H) the prosecution preferred the following circumstantial evidence:

1 That these drugs were found in the cultivation area occupied by the accused.

2 (a) The newspaper found in the kitchen P34 is similar to the newspaper wrappings of the heroin P20G and P21G.

(b) The plastic bags found outside the utility area were similar to the plastic bags containing the heroin in P20 E & H and P21 E & H but shorter.

3 The discovery of the small dacing (P33B) and weighing machines (P27B).

4 The fact that accused fainted when questioned about P8.

The evidence on accused occupation of this area came from PW1, the IO who said the house was occupied solely by the accused's family and that the 5 acre of plantation of which the house is built belonged to the accused's father-in-law but as he neither disclosed how and where he had obtained these facts nor produced any documents to back up his statement, his evidence is clearly hearsay and unsafe to rely on. The reason for the rejection of hearsay evidence is expressed in *Teper v. R* [1952] AC 480 in the following terms:

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.

An attempt was subsequently made through accused's brother-in-law to establish the point. However this witness indicated that only the house belonged to the accused but the surrounding land is owned by the accused's father-in-law. I therefore consider it impossible to infer that accused as the only cultivator or the person having the management of the plantation as such, could have knowledge of the drugs hidden on it some 50 feet away from the house.

The prosecution's case on 2 above is based on the chemist report on the similarity of the label Hong Seng Book Store which was attached to the newspaper wrapping P21G as well as the newspaper used to wrap P20D, P20G and P21D. However the evidence of PW8 who also happened to be the proprietor of Hong Seng Book Store shows that although he recalled the accused having taken some of these from his shop for wrapping fruits, such labels and newspapers were easily available and was in fact availed on by other customers as well. As for the plastic bags these are by their multifarious uses common items of any household. Unless there be any distinguishing marks or manufacturer's label on these, it is impossible to distinguish them from the millions of such bags of the same thickness, width and material that can be obtained freely in the open market. As such it is unreasonable and certainly injudicious to impute that the newspaper wrappings and plastic packings of the drugs came from the accused's kitchen. As a matter of fact, the plastic bags were found outside the kitchen and as for the newspaper, these were only recovered some 7 hours later in an unguarded part of the kitchen. So was the case of the small scales (dacing). In any event a small dacing is for a variety of uses and not confined to the weighment of drugs only. Furthermore, if it was so used, some traces of drugs could have been detected on it.

In an attempt to prove accused's knowledge of the drug, the prosecution adduced the evidence of PW3's interrogative conversation with the accused and the latter's reaction to his questions. It was alleged that the accused fainted on being asked about a packet of plastic bags found in room D. This piece of evidence is highly prejudicial and indeed inadmissible. Although this episode did not involve the actual words spoken by the accused, the evidence of his conduct subsequent to the question is tantamount to a forced admission of his guilt and therefore rendered inadmissible by s. 113 of the Criminal Procedure Code and s. 37A of the Dangerous Drug Act. Even if it is argued to be voluntarily made it is nevertheless inadmissible as the representation was made to a police personnel below the rank of an Inspector.

A more serious imputator of knowledge came from the alleged behaviour of the accused in turning his head to look towards the spot of the hidden heroin. Such allegation which can be easily made has to be convincingly substantiated. PW3's account of the accused's conduct is delusory. It seemed that the accused who was facing the main road repeatedly turned his head side ways towards a spot in the plantation. To start with, I cannot appreciate why the accused should be facing the opposite direction when the entire search party was actively making a search at the back of the house. Secondly even if he did so he could not possibly turn his head almost 180 degrees to look at the spot where the heroin was found. PW3's story was in no way corroborated by the second detective guarding the accused, (PW7) who in fact contradicted him by saying that the accused was looking towards the direction of the back when the search was being conducted. I am unable to accept PW3's evidence on this allegation.

In respect of the discovery of 5.61 gms of morphine and 30.86 gms of heroin, the prosecution again relies on the similarity between the plastic bags found outside the house and the container of the packages of the morphine P13D and the heroin P13F. As said earlier, mere similarities of the plastic bags alone cannot imply that the containers of the morphine and heroin came from those found at the exterior part of kitchen as these bags are freely and abundantly available in most groceries shops.

However, in addition to this, the prosecution seeks to rely on the presumption under s. 37(b) and (g) of the Dangerous Act DPP contends that as the accused was the occupier of the premises, he is deemed to have knowledge of the drugs first discovered and since the

definition of premises include a shed or any place whether open or enclosed, the drugs which were recovered at the covered part outside the house must be construed by the definition to have been so concealed in the premises.

It is trite law that before the presumption of knowledge under s. 37(g) can be invoked, the prosecution must prove that the accused was the occupier of the premises and occupation is presumed on proof of management and control. The term occupier in the context of these presumption must mean the person having exclusive occupation of the premises and premises must include the actual part of the premises in which the drug was found. In other words, if as in the present case, the drug was found in a shed, the prosecution must prove that the accused was the actual occupier and has control and management of the shed as well. See *Lim Say Hun v. PP* [1950] MLJ 116; *PP v. Lai Ah Bee* [1974] 2 MLJ 74; *Low Geok Yeok v. PP* [1982] 2 MLJ 347. Such proof is not surmountable by showing that the accused had management and control of the main enclosed part of the premises only, and by mere interpretation of the inclusive definition of premises in s. 2, extend such management and control to the exterior area of the premises. Whilst it is reasonable to infer that the accused has knowledge of the drugs concealed in those enclosed parts of the house to which the accused has frequent access it is not so in the case of places outside where others case go. In such instance it is imperative that some evidence of the occupier's collocation or affiliation with the object found such as the discovery of his own belonging near the spots or circumstances implying the exigency of his occupation of that part of the premises must be proved. See *PP v. Ahmad bin Puteh & Ors.* [1987] CLJ (Rep) 853. In this respect I find no evidence suggesting that the exterior area of the back of the house has been recently used. In fact on the contrary, the dry condition of the concrete reservoir with many exhibit dumped in it seem to suggest that the area was not in use. I have noted that the bucket in which the heroin was found contained wheat grains and that the existence of a chicken run was mentioned in passing by PW9 but in the absence of more specific information on the location of this chicken run and in particular the existence of any chicken in it. I am unable to infer that the grains used were for the daily feeding of the chicken and thus implying the possibility of frequent use of the area.

To prove the accused's occupancy of the premises, the prosecution introduced three sources of evidence, two of which were oral and the other by circumstantial documentary evidence. The evidence of PW1 on this issue as mentioned earlier is clearly heresay whilst that of PW8, even if accepted on the strength of his personal knowledge, will only establish the ownership of the house. Ownership and occupation of the premises are two separate issue, one does not necessarily involve the other. However the recovery of the Electricity and water bill when considered together with his entire family's premises at 12.15 a.m. is sufficient to my mind to infer occupancy of the enclosed portion of the house only. Be it so, I am unprepared to infer from the bills and accused's presence alone that the accused has exclusive management and control of the exterior area of his house at which the drugs were recovered, especially so when the evidence clearly indicate that only the house but not the entire 5 acres surrounding area on which the house stood, belonged to or was occupied by the accused.

The entire case against the accused is founded on circumstantial evidence. The question then, I will have to answer at this stage is whether the circumstances so proved must necessarily lead only to the inference that the wrapper found with the morphine and heroin came from the premises occupied by the accused and therefore by further inferences he had possession of these. This is certainly not the case in our present trial as both the old

newspaper and plastic bags are items of common use in any household and abundantly available to anybody. It is therefore erroneous to embark on the hypothesis that only the accused could have used them.

As regards the presumption of knowledge of the first recovery of the drugs, I find that the accused has not been proved to be an occupier having extensive management and control of the exterior area of the house belonging to someone else and therefore no presumption under s. 37(g) can be invoked.

I find that the prosecution has failed to make out a *prima facie* case against the accused or a case if unrebutted would warrant a conviction. I therefore acquit and discharged the accused.

Also found at [1990] 1 CLJ 983